APPENDIX A

[Stamped: Filed December 5, 2003]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN HOOD, Plaintiff – Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant – Appellee.	No. 02-15084 D.C. No. CV-99-00025-DAE MEMORANDUM[*]

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Submitted December 3, 2003[**]
Seattle, Washington

Before: KLEINFELD, GOULD, and TALLMAN, Circuit Judges.

Appellant Martin Hood appeals from an order of the United States District Court for the District of Hawaii granting appellee State Farm Fire and Casualty Company's motion to strike Hood's demand for a jury trial. Hood concedes that his jury demand was untimely under Rule 81 of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 81(c). Nevertheless, Hood maintains that this rule should not be interpreted to

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36–3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deny the district court discretion to grant Hood's jury demand where the untimeliness of the demand resulted solely from his inadvertence. We review for abuse of discretion. *Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002).

Our established law precludes Hood's claim: "An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." *Pac. Fisheries Corp.* v. *HIH Casualty & Gen. Ins. Ltd.*, 239 F.2d 1000, 1002 (9th Cir. 2001); *see also Zivkovic*, 302 F.3d at 1086. Hood does not make any showing of cause for the untimeliness of his demand. Our panel is without authority to alter the law of this circuit, which can only be done by an en banc court. *United States* v. *Hayes*, 231 F.3d 1132, 1139-40 (9th Cir. 2000). The district court under settled precedent was required to strike Hood's untimely jury demand.

AFFIRMED.

[Stamped: Filed January 23, 2004]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN HOOD, Plaintiff – Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant – Appellee.	No. 02-15084 D.C. No. CV-99-00025-DAE District of Hawaii, Honolulu ORDER

Before: KLEINFELD, GOULD, and TALLMAN, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

[Stamped: Filed June 8, 1999]

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IN THE UNITED STATES COURT

FOR THE DISTRICT OF HAWAII

MARTIN HOOD, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, a/k/a STATE FARM INSURANCE COMPANIES, Defendant.	CIVIL NO. 99–00025 DAE ORDER GRANTING DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO STRIKE PLAINTIFF MARTIN HOOD'S DEMAND FOR TRIAL BY JURY FILED ON FEBRUARY 19, 1999, FILED ON APRIL 20, 1999 HEARING Date: May 20, 1999 Time: 10:00 a.m. Judge: Hon. Francis I. Yamashita TRIAL DATE: Feb. 29, 2000

ORDER GRANTING DEFENDANT
STATE FARM FIRE AND CASUALTY COMPANY'S
MOTION TO STRIKE PLAINTIFF MARTIN HOOD'S
DEMAND FOR TRIAL BY JURY FILED
ON FEBRUARY 19, 1999, FILED ON APRIL 20, 1999

Defendant State Farm Fire and Casualty Company's Motion to Strike Plaintiff Martin Hood's Demand for Trial by Jury Filed on February 19, 1999, Filed on April 20, 1999 having come on for hearing before the Honorable Francis I. Yamashita on May 20, 1999 at 10:00 a.m., Joseph A. Ryan, Esq. appearing for Plaintiff Martin Hood ("Plaintiff") and Lisa A. Ginoza, Esq. appearing for Defendant State Farm Fire and Casualty Company ("State Farm"), and the Court having carefully reviewed all memoranda, declarations and exhibits submitted, having heard and considered the arguments of counsel and being fully apprised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that State Farm's Motion to Strike Plaintiff Martin Hood's Demand for Trial by Jury Filed on February 19, 1999, Filed on April 20, 1999 is GRANTED. The motion is granted on the following grounds:

(1) Plaintiff's demand for trial by jury is untimely under F.R.C.P. 81(c) and therefore constitutes a waiver by Plaintiff of trial by jury; and

(2) this Court has no discretion to order a jury trial under F.R.C.P. 39(b).

DATED: Honolulu, Hawaii, June 8, 1999.

/s/ FRANCIS I. YAMASHITA
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:
/s/ JOSEPH A. RYAN, ESQ.
Attorney for Plaintiff

[Stamped: Filed November 26, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARTIN HOOD, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	CIVIL NO. 99–00025 DAE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court conducted a bench trial in this action from September 19-21, 2001, October 11-12, 2001 and October 16, 2001.[1/] Paul Saccoccio, Esq., appeared on behalf of plaintiff; Mark J. Bennett, Esq., and Lisa W. Ginoza, Esq., appeared on behalf of Defendant.

BACKGROUND

On February 14, 1997, Plaintiff's residence was damaged by fire. Plaintiff was insured through Defendant State Farm Fire and Casualty Company. Following a detailed investigation, in which the Honolulu Fire Department and Defendant's fire investigator both determined that the fire was "incendiary," Defendant denied coverage for the claim.

Based on this denial of his insurance coverage, Plaintiff filed his First Amended Complaint ("the Complaint") in this case in state court on February 20, 1998. The Complaint

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[1/] The break in dates was due to scheduling conflict with certain of the parties' expert witnesses.

alleged intentional infliction of emotional distress, breach of contract, and bad faith and deceptive acts and practices. Defendant removed the case to this court.

Defendant moved for summary judgment, which this court granted in part and denied in part on September 19, 2000. Specifically, the court dismissed the claims for intentional infliction of emotional distress and bad faith, but allowed the breach of contract claim to proceed. Although the court found that Defendant had produced substantial evidence that the fire was in fact incendiary, Plaintiff had come up with one expert who stated that the cause of the fire was undetermined. This was enough to overcome a motion for summary judgment and submit the issue to the fact finder.

The matter, therefore, initially proceeded to trial on September 19, 2001. In accordance with the order of this court, Plaintiff and Defendant submitted their amended proposed findings of fact and conclusions of law on October 24, 2001. Having considered the testimony and evidence presented at trial, judging the credibility of the witnesses[2/] and the weight of evidence, and for the reasons set forth below, the court now enters the following Findings of Fact and Conclusions of Law in accordance with its obligations under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 42(c).

[2/] The following witnesses testified at trial:

1. Jeff Ball, Defendant's Claim Representative
2. Martin Hood
3. Peter Davenport, Plaintiff's neighbor
4. Ryce Reeves, passerby who initially sighted and reported the fire
5. Yukali Ohno-Davenport, Plaintiff's neighbor
6. Bill Barnfield, Plaintiff's neighbor
7. Captain Steven Johnson Honolulu Fire Department
8. Jonathan L. Shouman, Defendant's cause and origin expert
9. Captain Glenn Solem, Honolulu Fire Department
10. Rex Millard, Plaintiff's cause and origin expert

FINDINGS OF FACT

1. After reviewing relevant case law, the court determined that, under the "accidental loss" language of the policy, the initial burden to show that the fire was accidental falls on the Plaintiff. Once Plaintiff has proven that the loss was accidental, the burden shifts to Defendant to prove denial of coverage was reasonable.

2. Even if Plaintiff did not have the initial burden of proving that the fire was accidental, if Defendant proves that the policy was void, Defendant did not breach its contract with Plaintiff.

3. On February 14, 1997, a fire ("the fire") destroyed Plaintiff's residence located at 59-506 Kamehameha Highway, Haleiwa, Hawai`i 96712.

4. At the time of the fire, Plaintiff's residence was insured by Defendant under Homeowners Extra Policy No. 51-BJ-8974-6 ("the policy"), which covered any casualty that met the policy's terms. The policy was issued on January 27, 1997 and was effective for one year. *See* Joint Exhibit ("JT Ex.") 37A (copy of insurance policy). Defendant did not pay Plaintiff's claim on the grounds that Plaintiff's loss was not an accidental loss, as required by the terms of the policy. *See* Def.'s Memo in Support of Mot. For Leave to File Counterclaim for Declaratory Relief against Plaintiff ("Def.'s Jan. 20, 1999 Memo"), 3 (citing Vea Decl. at ¶7).

5. The fire started at approximately 5:10 a.m. Captain Steven Johnson ("Captain Johnson") testified that the fire was logged at the Honolulu Fire Department ("HFD") Sunset Beach Station at approximately 5:16 a.m. *See* JT Ex. 39, 021 (HFD Fire Investigation Report).

6. Captain Johnson further testified that the firefighters arrived at the scene of the fire (the scene") at approximately 5:18 a.m. and that, at their time of

arrival, Plaintiff's house was "fully involved," which meant that the fire had multiple points of origin. The fire was under control within twelve minutes of HFD's arrival, at approximately 5:28 a.m. *See* JT Ex. 39, 021 (HFD Fire Investigation Report).

7. The fire was extinguished at 6:11 a.m. *See* JT Ex. 40A, 003 (Honolulu Police Department ("HPD") report noting time of extinguishment).

8. Captain Johnson classified Plaintiff's house as a "total loss," because even though the structure was still standing, the fire had destroyed most everything and rendered the house uninhabitable.

9. Captain Johnson referred the fire at Plaintiff's residence to fire investigator and Captain of the HFD Fire Investigation Section, Captain Glenn Solem ("Captain Solem"). The physical conditions that caused Captain Johnson to refer the case to the fire investigator were (i) the distinctive burn patterns underneath the Plaintiff's house which suggest that "flammables" could have been involved; (ii) on the Sunset side of Plaintiff's house, spots of considerable burning were next to spots with little burning which seemed unnatural and suggested the use of liquid accelerants in some areas; (iii) considerable charring on the back porch was odd because the fire was apparently inside the house, making it unusual to see so much damage outside; and (iv) there appeared to be multiple origins of the fire which was suspicious because a normal fire would usually originate in one spot. *See* JT Ex. 39, 26-63 (HFD photographic report accompanying photographs that depict damage and burn patterns).

10. Captain Solem arrived at the fire scene at 6:32 a.m. *See* JT Ex. 40A (HPD report noting time of Captain Solem's arrival).

11. Plaintiff stipulated to Captain Solem's qualification as an expert witness. Captain Solem testified that when he arrived at the site, he initially assumed, as is his habit, that the fire was accidental. Only when the evidence at the site did not match the progression of a normal fire, did Captain Solem entertain the thought of a suspicious origin.

12. In conducting his investigation, Captain Solem relied upon the "systematic approach" or "process of elimination," which he said is now call the "scientific method." Specifically, this process calls for (i) recognizing the problem, (ii) collecting all data, (iii) considering, by way of the systematic approach, all the reasons how or why the fire could have occurred, (iv) eliminating all the reasons precluded by the circumstances, and finally (v) testing the remaining hypothesis. *See* JT Ex. 39, 25 (HFD Fire Investigation Report summarizing Captain Solem's conclusion based on process of elimination); *see generally* JT Ex. 39, 22-25 (HFD Fire Investigation Report summarizing Captain Solem's investigation).

13. As part of the investigation, Captain Solem also took photographs; interviewed the Plaintiff and Ryce Reeves, the initial witness of the fire; discussed the scene with Captain Johnson, the firefighters, and the City and County Electrical Inspector; and briefly reviewed Mr. Shouman's and Mr. Ball's reports.

14. After concluding his investigation, Captain Solem ruled out all accidental causes—*e.g.*, Plaintiff's smoking, electrical, or spontaneous combustion—and natural—*e.g.*, lightening—causes of the fire. Relying on the relevant factors of (2) air space, (2) heat release rate, (3) location of combustible products in the room, (4) transfer of heat and time sequence, and (5) amount of oxygen in the room, Captain Solem ultimately determined that the extensive and excessive damage

incurred at the site could not have been the result of a natural fire. Rather, Captain Solem found this to have been an incendiary fire with multiple points of origin that involved the use of an accelerant like gasoline.

15. The six samples taken by Captain Solem and HPD tested either negative or inconclusive, which means that affirmative traces of accelerant were not found, but not that there was no accelerant present.

16. On February 15, 1997, the day after the fire, Jeff Ball inspected the fire site. After walking throughout the remainder of Plaintiff's residence, taking photographs of the site, and speaking with the Plaintiff and Plaintiff's neighbors, Mr. Ball testified that he had found the circumstances of the fire "suspicious." As a result, Mr. Ball called to have the resource claims specialist in the region recommend a cause and origin specialist.

17. On February 17, 1997, Defendant hired investigator John Shouman of Fire Protection Consultants. Mr. Shouman is a fire cause and origin specialist. At trial, Plaintiff stipulated to Mr. Shouman's qualifications as an expert on the cause and origin of fires.

18. Mr. Shouman visited and investigated the fire site from February 18-20, 1997.

19. As part of his investigation, Mr. Shouman walked around the inside and outside of Plaintiff's residence, took photographs and video recordings, measured and diagramed Plaintiff's residence, made computer-generated models of Plaintiff's residence, and met with Plaintiff in order to walk through the residence with Plaintiff in an attempt to reconstruct the scene.

20. Mr. Shouman determined that much of the house had gone into flashover (a transition phase in which almost everything in the house is emitting vapors and is on fire) and even post flashover (complete destruction).

Mr. Shouman also observed unnatural burn patterns, which were elongated and contained deeper and more defined burning than the typical char. These patterns appeared to be the result of the use of an ignitable liquid.

21. Mr. Shouman took three samples from Plaintiff's residence, all of which tested negative. However, the test results state that a finding of negative does not preclude the presence of flammable or combustible liquids at the fire scene. Thus, Mr. Shouman testified that the test results were "inconclusive" for the presence of ignitable liquids, because the results did not preclude a particular cause and origin finding. The court finds based on testimony it finds wholly credible that all traces of ignitable liquids may have been destroyed and/or eliminated in such a very hot and fast fire, rendering it impossible for any laboratory tests to turn up positive despite the original use of an accelerant.

22. Mr. Shouman determined that this was a "suspicious" or "incendiary" fire. *See* JT Ex. 11, 25 ¶¶21-24. In making this determination, Mr. Shouman used a systematic, scientific approach, relying on the process of elimination. First, Mr. Shouman found no evidence that electrical wire contributed to the start of the fire. Second, Mr. Shouman eliminated all heat-producing devices as the cause the fire, including the lamp Plaintiff said might have caused the fire. Third, Mr. Shouman eliminated spontaneous combustion as a possible cause. Fourth, Plaintiff told Mr. Shouman that he might have smoked a cigarette before going to bed. Nonetheless, Mr. Shouman was able to dismiss this cigarette as the cause, because a cigarette left smoldering on a mattress or a blanket would take approximately two hours to cause a fire and the fire at Plaintiff's residence did not start within two hours of the time Plaintiff said that he went to bed and may have smoked the cigarette. Mr. Shouman found elongated burn patterns that

indicated the use of flammable accelerants. *See* JT Ex. 8, 00061 (illustrating areas where accelerants appear to have been poured). Like Captain Johnson, Mr. Shouman also concluded that there were multiple points of origin for the fire. Through the use of the process of elimination, Mr. Shouman found that there was no explanation for the fire other than that it was incendiary.

23. Mr. Shouman independently investigated the fire scene and therefore did not rely on the conclusions or samples of others in arriving at his determination.

24. Rex Millard appeared as the Plaintiff's cause and origin expert. Defendant stipulated to Mr. Millard's qualifications as an expert. Mr. Millard did not visit the fire scene, but rather conducted his investigation by reviewing the available documentation.

25. Mr. Millard concluded that the fire's origin was undetermined because there were natural explanations for all that occurred in the fire and there was insufficient documentation to evaluate the fire's origin. Mr. Millard considered only the physical evidence in reaching his conclusion; in other words, he did not take into account the Plaintiff's inquiry about whether his neighbors had fire insurance, the neighbors' reactions to the fire, or the facts that Plaintiff was in a desperate financial situation and chose to walk to a payphone to report the fire rather than have his neighbor call the fire department.

26. Mr. Millard stated that he would have conducted the investigation differently, but would not say that Captain Solem's or Mr. Shouman's investigations were poorly conducted.

27. Mr. Millard admitted that the best evidence was that which could be viewed and collected at the scene and that not having visited the scene placed him at a disadvantage. Mr. Millard also admitted that he had found evidence neither proving that the fire originated

from natural or accidental causes nor disproving that the fire was incendiary. Mr. Millard essentially agreed that a cigarette could not have started the fire.

28. Although Mr. Millard did not agree with Mr. Shouman's and Captain Solem's conclusion that the fire had multiple points of origin, he agreed that nothing in the physical evidence was inconsistent with the fire's having multiple points or origin.

29. Mr. Millard confirmed that negative test results did not necessarily rule out the use of liquid accelerants and stated that he knew of fires that were classified as incendiary despite no accelerant having been found. The court therefore finds that Mr. Millard's testimony does not preclude a finding that the fire was incendiary.

30. The court finds that Mr. Millard's not visiting the site placed him at a considerable disadvantage. His testimony that the fire's cause could not be determined is outweighed by the testimony of four witnesses, namely, Captain Johnson, Captain Solem, Mr. Ball, and Mr. Shouman, all of whom were present at the site and found the circumstances surrounding the origin of the fire suspicious. In particular, the court was persuaded by the fact that Captain Solem independently corroborated Mr. Shouman's conclusions that the fire had multiple points of origin and was incendiary. For example, Mr. Shouman determined that that "unusually rapid communication" between the lower and upper levels was the result of the fire's having multiple points of origin. Similarly, Captain Solem determined that there was simultaneous burning of both the upstairs and downstairs of the residence, which meant that there had been multiple points of origin.

31. Although Mr. Shouman and Captain Solem admitted that elongated, linear patterns can be caused by things other than liquid accelerants, the court agrees with these experts that the lack of any another explanation for the

cause of the fire, coupled with the location of these unusual burn patterns along a natural walking path, and the simultaneous burning of both the upstairs and downstairs of the residence indicate not an accidental fire, but a fire with multiple points of origin and the use of a liquid accelerant to cause and spread the fire.

32. Mr. Millard admitted that, in light of his decades of experience as a fire investigator, the facts of Plaintiff's case struck him as suspicious.

33. The court also finds Plaintiff's actions, statements, and explanations before and after the fire suspicious. For instance, Plaintiff did not notify any of his neighbors of the fire. Plaintiff did not even ask to use any of his neighbors' phones to report the fire. Instead of walking the approximately fifteen feet to the Davenport's house or the less than 100 feet to Mr. Barnfield's house in order to use either of their phones (not to mention alert them to the fire), Plaintiff chose to casually walk approximately a 1/4 mile away to the nearest payphone. *See* JT Ex. 27, 6 (copy of Mr. Davenport's deposition describing distance from Plaintiff's house); *see also* JT Ex. 29, 8 (copy of Bill Barnfield's deposition describing distance from Plaintiff's house). When questioned as to why Plaintiff did not knock on his next door neighbor's door in order to use their telephone to report the fire rather than walk the 1/4 mile to the payphone, Plaintiff said that it was "quicker to walk." The court finds Plaintiff's answer and behavior highly suspicious.

34. Within the month preceding the fire, Plaintiff had a conversation with Peter Davenport, Plaintiff's neighbor, in which Plaintiff asked Mr. Davenport if he had fire insurance. Since then, Plaintiff has provided different explanations for why he asked the question. The court finds the initial asking of the question indicative of Plaintiff's intent to burn down his house and the lack of

a consistent explanation as to why he asked the question indicative of Plaintiff's hiding something.

35. Plaintiff also was dishonest about his prior convictions, failing to list his November 16, 1996 and April 29, 1997 shoplifting convictions in his response to the December 14, 1998 interrogatory. *See* JT Ex. 21, 2.

36. In addition, Plaintiff gave inconsistent testimony regarding his actions on the night of the fire. Mr. Shouman testified that Plaintiff, while reciting his version of the events on the night of the fire, suddenly realized that his version of the facts was illogical and quickly changed his story about the door from which he exited.

37. Overall, the court finds that these multiple examples of Plaintiff's evasiveness and dishonesty call into doubt Plaintiff's trustworthiness and credibility as a witness.

38. At the time of the fire, Plaintiff was financially stressed. Plaintiff's bank records show a balance of $1.50 on January 7, 1997 and of $.50 on February 28, 1997. *See* JT Ex. 45 (certified true copies of bank records). In addition, Plaintiff was two months behind on his mortgage payment, having missed the January and February payment dates, and knew that if he missed a third payment, the bank would foreclose on the mortgage. Plaintiff was not receiving rent, his usual source of income, because his last tenants had moved out in mid-January. The only prospective source of income Plaintiff apparently had was possible money from Plaintiff's mother who Plaintiff testified was planning to visit him on the 20th of February 1997.

39. Prior to the fire, the Plaintiff had a yard sale. The court finds that this fact, taken together with all the other information regarding Plaintiff's financial circumstances, further suggests that Plaintiff was in dire financial straights at the time of the fire.

40. At the time of the fire, Plaintiff's house also was for sale. Plaintiff testified that he spoke with his realtor a few days prior to the fire and agreed orally to lower the sale price from $210,000 to $199,000 because he wanted to sell the house and was concerned that his realtor had not been showing the property. *See* JT Ex. 33 (listing agreement(s) and correspondence between realtors and Plaintiff); JT Ex. 46 (same). The court finds that this fact, taken together with all the other information regarding Plaintiff's financial circumstances, further suggest that Plaintiff was in dire financial straights at the time of the fire.

41. At the time of the fire, Plaintiff was the sole owner of the house and the named insured on the insurance policy. *See* JT Ex. 37A (copy of insurance policy); Def.'s Jan. 20, 1999 Memo, 1.

42. Due to his dire financial condition, Plaintiff had motive to set the fire in order to obtain the insurance proceeds.

43. Mr. Millar agreed that Plaintiff's financial situation was such that he had motive to set his house on fire.

44. As Plaintiff testified, he knew that if his house burnt down the insurance company would pay to have the house rebuilt and would pay the mortgage "for awhile." *See also* JT Ex. 20, 105 ¶2-8 (Plaintiff stated under oath that after his house burnt down in 1982, the insurance company paid his mortgage while the house was being rebuilt). The court finds that the Plaintiff had knowledge all of the benefits and proceeds he could expect from the insurance policy should his house burn down.

45. Mr. Millard stated that gasoline is commonly used to start liquid accelerant fires. A gasoline can, which was approximately half full, was found at the site.

46. The court disbelieves Plaintiff's testimony regarding the presence of the gasoline and the gas can at the site.

Plaintiff testified that he filled the gasoline can when he bought the gas, closed the container, but then spilled some gasoline while he rode his bike home and then placed some in the lawnmower. Hence the gasoline can was found only partially full. Mr. Davenport testified that he could not recall ever having seen Plaintiff mow his lawn in the four to five years prior to the fire that he had been living next door to Plaintiff. Plaintiff admitted at trial that his lawn "was a jungle" and had not been mowed in at least one year. Because Plaintiff could not provide a plausible explanation for the presence of the half-empty gasoline can at the site, the court finds that the gasoline from the can was used by Plaintiff to start the fire.

47. In the evening of February 13, 1997, Plaintiff returned to his residence where he remained alone with all of the doors leading to the exterior locked from the inside. From this fact, the court concludes that no one else could have started the fire.

48. The presence of the gasoline at the site, coupled with the fact that Plaintiff was home alone, establish by clear and convincing evidence that Plaintiff had opportunity to start the fire.

49. Thus, the court finds that Plaintiff, who had motive, knowledge, and opportunity, did in fact start the fire for purposes of obtaining the insurance proceeds.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the action pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

2. Under the applicable State Farm Homeowners Extra Policy, accidental losses are covered However, the policy is void if any person insured under the policy causes a loss to the property for the purpose of obtaining insurance benefits OR intentionally conceals or

misrepresents, before or after the fire, any material fact or circumstance relating to the insurance.

3. The testimony of Defendant's witnesses clearly and unambiguously established that this was an incendiary fire. Hence, Plaintiff failed to sustain his burden of proof as to the accidental nature of the fire as required by the insurance policy.

4. Defendant has proven by a preponderance of the evidence and by clear and convincing evidence not only that Plaintiff intentionally concealed and misrepresented material facts and circumstances relating to his claim of insurance benefits, but also caused the fire in order to obtain insurance benefits. For both of these reasons, the policy is void.

5. Because the policy was void, it was reasonable for the Defendant to deny coverage for the fire and refuse to pay Plaintiff the related insurance benefits.

6. Defendant did not breach its insurance contract with Plaintiff.

7. Even if all burdens of proof in this case rested on the Defendant, it carried these burdens of proof in establishing by clear and convincing evidence the incendiary nature of the fire and that Plaintiff was the cause of the fire.

CONCLUSION

Any findings of fact which should more properly be deemed conclusions of law and any conclusions of law which should more properly be deemed findings of fact shall be so construed.

Pursuant to its findings and conclusions contained herein, the court hereby ORDERS that judgment be entered in favor of Defendant on all claims.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 26, 2001

/s/ DAVID ALAN EZRA
DAVID ALAN EZRA
CHIEF UNITED STATE DISTRICT JUDGE

APPENDIX B

UNITED STATES CONSTITUTION

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 6(b)

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in it discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 38(b)

Rule 38. Jury Trial of Right

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2)

filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

Rule 38(d)

Rule 38. Jury Trial of Right

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39(b)

Rule 39. Trial by Jury or by the Court

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Rule 81(c)

Rule 81. Applicability in General

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be

accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.